

## **Appendix C**

### **DNREC Guidance For Implementation and Interpretation of the Regulations Governing Delaware's Coastal Zone**

#### **A. INTRODUCTION**

1. These regulations are built around two linked goals as developed by Governor Carper's Coastal Zone Regulatory Advisory Committee. This committee met in late 1996, through 1997 and culminated their work in early 1998 with signing of the Memorandum of Understanding (MoU) that formed the basis for these regulations . These regulations are designed to ensure environmental improvement in the Coastal Zone while at the same time providing industry with the needed flexibility to remain competitive in a global marketplace.
2. In order to meet these two goals, a regulatory process comprised of regulatory exemptions, permitting requirements and offset provisions has been developed. This regulatory process has been designed so that each nonconforming use and new manufacturing uses can add new products, change existing products, increase production capacity, add new processes and modify existing processes or do any other activity so long as these activities are: 1) undertaken in a way that assures environmental improvement in the Coastal Zone; and 2) undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act.
3. For a more thorough explanation of the deliberations of the Advisory Committee and the foundation upon which these regulations are built, the reader is referred to the final Memorandum of Understanding dated March 19, 1998, and which is available in the offices of the Department at 89 Kings Highway, Dover, Delaware.
4. The following guidance is made available to interested citizens and applicants to better understand how these regulations will be interpreted and implemented by the Department. This guidance is, however, not a regulation and does not have the force of law. In the event of a conflict between this guidance and the regulations, the regulations will prevail.

#### **B. GUIDANCE IN DETERMINING WHETHER A PERMIT IS REQUIRED**

1. When a business wants to conduct an activity that may be one of the activities exempted from the permitting process as outlined in Section E, but the business is unsure of its determination, then the company may choose to seek a status

decision from the Secretary rather than proceeding with filing a Coastal Zone permit application.

2. The Advisory Committee recommended that DNREC establish a tiered system of Coastal Zone Act permitting and emphasized that such a system would promote efficiency to the permitting process by tailoring the extent of regulatory review to the expected impacts of the proposed project. Under the tiered approach outlined in the MOU, an industry would have been required to obtain a Coastal Zone Act permit only in those instances when a proposed new manufacturing facility, or a change in the operations of a heavy industrial or manufacturing facility, may have a negative impact on one or more of the six criteria cited in the Act .
3. These regulations have maintained that provision, however, they have removed the concept of a tiered system and in its place created essentially two levels of review. The first are activities that are clearly exempted from regulation because they have no environmental consequence, they are exempted in the Act or they were seen by the advisory committee to be activities that simply shouldn't require a permit. The second level is the full Coastal Zone act permit where any negative impact on the six criteria will trigger the permit requirement. In cases where the applicant is unsure of the impact or how their activity will be viewed by the Department, they may apply for what has historically been – and will continue to be -- called the “status decision”.

### **C. ENVIRONMENTAL GOALS AND INDICATORS**

1. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. The indicators will serve several important purposes. First, they will assist DNREC in developing a more accurate picture of the environmental quality of the Coastal Zone, and measuring trends in this quality over time. Second, they will assist DNREC and project applicants by providing a means for evaluating the potential impacts of proposed changes in facility operations and proposed offsets on the Coastal Zone environment.
2. DNREC is responsible for defining, prioritizing, and making a matter of public record the set of goals and indicators for assessing the environmental quality in the Coastal Zone. Once goals for Coastal Zone have been established, DNREC will select a detailed set of indicators for use in assessing the quality of the environment as measured against those goals, and to monitor progress over time.
3. DNREC will periodically review and reissue the Coastal Zone environmental indicators (perhaps bi-annually). As conditions in the Coastal Zone change, and scientific methods for tracking and analyzing these changes evolve, it may be necessary to add or change some indicators, or drop others. It may also be

necessary to reprioritize them as some parameters of environmental health improve and others decline. DNREC's periodic review of the indicators will allow for these kinds of adjustments to be made.

4. DNREC's process for developing and prioritizing the indicators will include opportunities for formal public review and comment. To ensure that the public has opportunities to provide input into the development and any subsequent revision of the environmental indicators, the Advisory Committee recommended that DNREC establish an Environmental Indicator Technical Advisory Committee (EITAC).
5. A substantial proportion of the members of the EITAC should be technical experts. The Committee should also include representatives of various stakeholder groups, for example, heavy industry and manufacturing in the Coastal Zone, industry outside the Coastal Zone, agricultural interests, environmental advocacy groups and labor. EITAC meetings should be public and any reports generated by the Committee should be made available to the public.

#### **D. PRINCIPLES FOR ASSESSING AN APPLICATION**

1. Any negative environmental impact associated with a proposed project will have to be more than offset, thus assuring continuing improvement in the Coastal Zone environment. The Secretary will only grant Coastal Zone permits in those cases where the overall environmental impacts of the total application, both positive and negative, assure improvement in the quality of the environment in the Coastal Zone.
2. Therefore, activities proposed for a Coastal Zone permit which would measurably increase air emissions, water discharges, or would cause negative impacts on the Coastal Zone environment, shall include provisions for net environmental improvement of the Coastal Zone environment. These environmental improvements may be part of the permitted activity itself or realized through an enforceable offset proposal that will be implemented by a date agreed to by the company and DNREC.
3. DNREC will develop within 12 months of the ratification of the Coastal Zone Act MOU, a set of Coastal Zone environmental goals and appropriate environmental indicators which will highlight the most significant environmental challenges to the Coastal Zone. These indicators will be "prioritized" in accordance with their significance to achieving the Coastal Zone environmental goals. These prioritized indicators will provide Coastal Zone permit applicants a good idea of which types of future offset investments will yield the greatest environmental benefit and will allow a determination of which investments are most cost-effective. These indicators should also provide the rational basis for permit decisions that involve offset proposals.

## **E. EVALUATION OF OFFSET PROPOSALS**

1. Although offsets within the Coastal Zone, in the same environmental medium and at the same site are preferred, there will be circumstances when offsets outside the Coastal Zone, in other media, or at another site within the zone provide greater environmental benefit or otherwise make sense, and will be considered by the Secretary.
2. While it is the applicant's responsibility to fully describe an offset proposal in the Environmental Impact Statement, it is the Secretary's responsibility to carefully assess whether the applicant's offset proposal will more than offset negative impacts of the project, and thus ensure environmental improvement in the Coastal Zone.
3. The Secretary shall make decisions on applicants' status decision requests and environmental impact assessments, in writing, based on all of the expected environmental impacts of the total project on the health of the Coastal Zone, including both positive and negative impacts. Impacts may be related to air and water emissions, or they may be related to other factors such as the viability of wildlife habitat, the protection of wetlands, or the creation or preservation of open space. The Secretary will develop and use a set of prioritized environmental indicators as a tool for assisting these determinations as discussed elsewhere in this guidance.
4. The Secretary shall consider likely cumulative impacts of proposed activities on the environment and the relevant environmental indicators. The Secretary shall also give consideration to the potential for negative cumulative impacts in situations where cross-media offsets are proposed.
5. In addition, the Secretary will give more weight to offset proposals that: 1) have established track records and are likely to succeed from a technical standpoint; and 2) will produce beneficial effects that are verifiable.
6. If an applicant includes in its permit application evidence of past voluntary environmental improvements and/or investments made prior to the time of application, DNREC will consider this history of environmental performance in determining the magnitude of the required offsets for the proposed project (with the understanding that the total project must assure improvement in the quality of the environment in the Coastal Zone).
7. The Secretary will also consider the applicant's ability to carry out such improvements as evidenced by its compliance history. Compliance with environmental standards and enforcement histories of facilities is not in itself a factor in determining the required magnitude of the potential offset project, but will be used by DNREC in gauging the applicant's ability to carry out the offset project with a minimum of supervision.

8. All offset projects must be incorporated into the Coastal Zone permit as an enforceable condition of the permit. Since some of the benefits of "flexibility" are achieved immediately upon issuance of a permit (i.e. permission to proceed), and most benefits of "environmental improvement" are achieved over time, the permit itself must include well-defined and measurable commitments or accomplishments which are independently auditable by the Department, and available to the public via the Freedom of Information Act (FOIA). DNREC will also include inspection, reporting and/or notification obligations in the permit depending on the company's compliance record and the nature of the offset project.
9. In cases where an applicant fails to receive all required offset permits within 180 days and must therefore show good cause why a new permit application should not be required, good cause shall mean, but not be limited to, delays on the part of DNREC or other permitting authorities that could otherwise not have been expected and are considered by the Secretary to be extraordinary.

#### **F. GUIDANCE REGARDING ACTIVITIES WITHIN THE PORT OF WILMINGTON**

1. All proposed manufacturing uses within the footprint of the Port of Wilmington are not in any way exempted from permitting requirements and must apply for and be issued a Coastal Zone Act permit if otherwise applicable.
2. Proposed uses within the Port of Wilmington which constitute heavy industry uses are prohibited.
3. The regulations do not prohibit or restrict activities involving containerized, palletized, or otherwise confined materials at any location within the Diamond State Port Corp. Bulk products, once off-loaded within the designated area, may be stored, transported, or otherwise used throughout the Port, subject to all other appropriate local, state and federal statutory and regulatory provisions.
4. The MoU negotiated by the Advisory Committee goes to some length to define the area that is the Port of Wilmington, some of which area is actually owned by the Diamond State Port Corporation. Regardless of the definition of the Port, it is nonetheless the equivalent of a "footprint" as that term is used to define other areas of industrial activity within the Zone. Therefore the definition of the Port as negotiated in the MOU is not repeated within the definitions section of these regulations but is rather transformed into a map or footprint similar to the other non-conforming industrial uses found in Appendix B of the regulation.
5. The current boundary of the Port of Wilmington is the area beginning at the intersection of the right of way of US Route I-495 and the southern shore of the Christina River; thence southward along said I-495 right of way until the said I-495 right-of-way intersects the Reading Railroad Delaware River Extension;

thence southeast along the said Reading Railroad Delaware River Extension to its point of intersection with the Conrail Railroad New Castle cutoff; thence southward along the Conrail Railroad New Castle cutoff until it intersects the right of way of U.S. Route I-295; thence eastward along said I-295 right of way until the said I-295 right of way intersects the western shore of the Delaware River; thence northward along the western shore of the Delaware River as it exists now to the confluence of the Christina and Delaware Rivers; thence westward along the southern shore of the Christina River to the beginning point of the intersection of the said I-495 right of way and the Southern shore of the Christina River.

## **G. COASTAL ZONE REPORT**

1. To ensure that the public is kept fully informed about the regulatory process under the Coastal Zone Act and about the quality of the Coastal Zone generally, the Secretary will issue a report twelve months after the regulations are promulgated, and every twenty-four months thereafter. The report will include:
  - a) A description of progress towards environmental goals developed by DNREC for the Coastal Zone;
  - b) Information on the general trends in the environmental indicators, in the form of narrative text as well as charts and graphs that will be easily understandable to a lay reader;
  - c) A list of permits issued, a brief description of the status of activities under those permits, and a review of selected existing permits and actual versus projected environmental benefits; and
  - d) A description of the cumulative impacts of permitted activities on the environmental indicators.